



452267

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY **RECEIVED**  
 WASHINGTON, D.C.

---

In re:

Gary Development Company

Docket No. RCRA-V-W-86-R-45

---

RCRA (3008) Appeal No. 96-2

ORDER DENYING MOTION FOR RECONSIDERATION

Gary Development Company (Gary) has requested reconsideration of the Environmental Appeals Board's (the Board) August 16, 1996 order dismissing the above-entitled appeal as untimely.<sup>1/</sup> As grounds for reconsideration, Gary contends that (1) service of the initial decision sought to be appealed was defective; (2) Gary's attorney, Warren D. Krebs, was ill and did not work "for numerous days between April 30 and May 28, 1996"; and (3) the Board's order dismissing Gary's appeal contains an erroneous "finding" of environmental risk that is not supported by the technical evidence that was introduced before the ALJ.

---

<sup>1/</sup> Portions of Gary's motion suggest that Gary regards the Board's August 16, 1996 order as a "final order" within the meaning of 40 C.F.R. § 22.31. That is not an accurate characterization of the August 16 order. The August 16 order is indeed "final" in the sense that no further review of the order is available within EPA, but the August 16 order is not a "final order" of the kind described in 40 C.F.R. § 22.31 because it does not adopt, modify or set aside any findings of fact or conclusions of law entered by the administrative law judge (ALJ) and does not assess a penalty. The ALJ's unappealed initial decision became the Board's "final order" (as that term is used in 40 C.F.R. § 22.31) as of May 28, 1996, when the Board declined to undertake sua sponte review of the initial decision. See 40 C.F.R. § 22.27(c). In contrast, the Board's August 16 order considered only whether to reopen the Agency's "final order" in this matter by accepting Gary's untimely appeal.

Under 40 C.F.R. § 22.32, a motion to reconsider "must set forth the matter claimed to have been erroneously decided and the nature of the alleged errors." Reconsideration is generally reserved for cases in which the Board is shown to have made a "demonstrable error" of law or fact in the challenged decision. In re Mayaguez Regional Sewage Treatment Plant, NPDES Appeal No. 92-23, at 2 (EAB, Dec. 17, 1993) (Order Denying Reconsideration and Stay Pending Reconsideration or Appeal). See also In re Southern Timber Products, Inc., 3 E.A.D. 880, 889 (Adm'r 1992) ("A motion for reconsideration should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of [the Board] clearly erroneous factual or legal conclusions.") (quoting In re City of Detroit, TSCA Appeal No. 89-5, at 2 (CJO, Feb. 20, 1991) (Order)). Gary has failed to demonstrate that any such factual or legal error affected the Board's decision dismissing Gary's untimely appeal.

The Board has already addressed Gary's contentions regarding service of the initial decision at some length. As the Board has recounted in detail, the Regional Hearing Clerk sent the initial decision by certified mail to Gary's last known counsel at counsel's last known address. Such service was in full compliance with 40 C.F.R. § 22.06. For that reason and for the reasons set forth in our August 16 order, we decline to reconsider our conclusion that service of the initial decision was proper.

---

Gary's contention that its attorney was ill during portions of the period within which an appeal was required to be filed is presented to us for the first time in Gary's motion for reconsideration, which was received by the Board on September 3, 1996. The contention relates to an alleged illness during portions of May 1996, but no such illness was mentioned in any of Gary's three previous filings (received June 4, June 21, and July 3, 1996) asking the Board to accept Gary's untimely appeal. The new contention, moreover, is plainly not based on any "newly discovered" evidence of a kind that might appropriately be presented for the first time in support of a motion to reconsider. See Publishers Resource, Inc. v. Walker-Davis Publications, Inc., 762 F.2d 557, 561 (7th Cir. 1985) ("Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during the pendency of the [original] motion. \* \* \* \* Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.") (citations omitted). Having presented no argument or evidence concerning counsel's illness at any time during the pendency of Gary's original petition seeking to institute an untimely appeal, Gary is precluded from raising

the issue now as a basis for reconsideration.<sup>2/</sup> Cf. Moro v. Shell Oil Co., No. 95-3289, 1996 U.S. App. LEXIS 18650, at \*7-\*8 (7th Cir. July 29, 1996) (post-judgment motion to reconsider pursuant to Fed. R. Civ. P. 59(e) "does not provide a vehicle for a party to undo its own procedural errors, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented \* \* \* prior to the judgment").<sup>3/</sup>

Gary's contention (set forth in an "amendment" to its motion for reconsideration) that our August 16 order was based on an erroneous "finding" of environmental risk is simply wrong. The findings supporting the issuance of a compliance order to Gary are those made by the ALJ, and, because Gary has presented no adequate justification for the untimeliness of its appeal, we have had no occasion to reopen the Agency's final order to rule on or reexamine any of those findings on the merits. The reference to an injunctive remedy in our August 16, 1996 order

---

<sup>2/</sup> Counsel's alleged medical condition during portions of May 1996 strikes us as the sort of circumstance that is ordinarily called to the attention of a court or other tribunal in the context of a timely filed motion for an extension of time. In this case, counsel filed no such motion; instead he waited until after this Board ruled on Gary's petition before bringing his alleged medical situation to the Board's attention.

<sup>3/</sup> The Federal Rules of Civil Procedure are not applicable to Agency proceedings conducted under 40 C.F.R. Part 22. E.g., In re Wego Chemical & Mineral Corp., 4 E.A.D. 513, 524 n.10 (EAB 1993). However, "[i]n some cases, the experience of federal courts in applying a federal rule can offer an instructive example." In re Detroit Plastic Molding Co., 3 E.A.D. 103, 107 (CJO 1990).

served only to emphasize the Board's recognition that there is more at stake in this matter than the collection of a monetary penalty -- namely, as we stated in our August 16 order, "an injunctive remedy designed to ensure protection of public health and the environment" -- which made the Board all the more reluctant to depart from the Board's precedents requiring strict adherence to the time limits for filing an appeal.<sup>4/</sup>

---

<sup>4/</sup> In the amendment to its motion for reconsideration, Gary asserts that any concern about potential groundwater contamination from Gary's landfill is "contrary to official conclusions made by the State of Indiana and IDEM" and that there is in fact "[a]bsolutely no environmental urgency" associated with the implementation of a groundwater monitoring system at the landfill. Amendment to Motion to Reconsider at 3-4. In response to those assertions, Region V presents a letter from the Indiana Department of Environmental Management (IDEM) addressing the potential impact of a further delay in implementing Judge Greene's April 8, 1996 compliance order. IDEM, which administers the federally authorized RCRA program in Indiana, states that it is "most concerned about the impending delay that would result with respect to the implementation and maintenance of a \* \* \* ground water monitoring system" if EPA's final order requiring the installation of such a system were to be reopened at Gary's request:

Such a delay may present a significant risk to human health and the environment, noting the proximity of the [Gary Development Company] facility to the Grand Calumet River. Because of the proximity of the facility to the Grand Calumet River, any plume of contamination would likely migrate toward the River.

Letter from Pamela J. O'Rourke, Acting Chief of the Hazardous Waste Section of IDEM's Office of Enforcement, to EPA Region V (September 12, 1996), Attachment 2 to the Region's "Response to Verified Motion to Reconsider and Amendment to Verified Motion to Reconsider."

We need not decide whether or to what extent there is any "environmental urgency" with respect to the injunctive relief mandated by the Agency's final order in this matter. In dismissing Gary's appeal as untimely, we made no finding of  
(continued...)

Finally, we note that Gary's motion repeatedly alludes to the Agency's delay in issuing an initial decision in this matter, although Gary never expressly argues that that delay excuses the untimeliness of Gary's appeal. To the extent that such an argument is implied, however, we reject it.<sup>5/</sup> As noted in our August 16, 1996 order, there are a number of important reasons for requiring compliance with the time limits established by regulation for filing an appeal. See August 16, 1996 Order at 5.

---

<sup>4/</sup> (...continued)

environmental "urgency," nor did we need to do so. We do, however, note that the Region, supported by IDEM, emphatically rejects any contention that the injunctive relief at issue is moot, such that a decision to accept an untimely appeal would involve no possible environmental consequences. In determining whether to grant the extraordinary relief that Gary has requested, to reopen a final Agency order to accept an untimely appeal, we think it entirely proper and well within the Board's discretion to take note of the environmental concerns expressed by IDEM and by Region V.

<sup>5/</sup> We are not unmindful of the lengthy interval between the conclusion of the hearing before the ALJ and the issuance of the initial decision. However, Gary was not prejudiced by that delay; to the contrary, pending issuance of the initial decision (which became a final order on May 28, 1996) Gary was under no obligation to pay the penalty proposed by the Region and now owing to the federal treasury, and Gary was likewise able to defer the implementation of remedial measures that were proposed by the Region and are now mandated by a final Agency order. To the extent that Gary may feel it was prejudiced because its attorney Mr. Krebs changed addresses during this period and failed to get a copy of the initial decision served at his new address, that circumstance is a direct result of the fact that neither Gary nor any of its counsel notified the Presiding Officer and Regional Hearing Clerk of the change of address, as required by 40 C.F.R. § 22.05(c)(4). Moreover, as explained in our August 16, 1996 order, there is no basis for any suggestion that Mr. Krebs' delayed receipt of the initial decision at his new address caused Gary's appeal to be untimely. Even if we were to calculate Gary's appeal period as having run from the latest possible date of Mr. Krebs' actual receipt of the initial decision, the appeal would still be untimely.

Gary has failed to demonstrate the existence of any special circumstances that would justify deviating from those time limits in this case. Gary's motion for reconsideration of the Board's August 16, 1996 Order Dismissing Appeal is, accordingly, denied.

So ordered.

ENVIRONMENTAL APPEALS BOARD

By: Kathie A. Stein  
Kathie A. Stein  
Environmental Appeals Judge

Dated:

*September 18, 1996*

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Motion for Reconsideration in the matter of Gary Development Company, RCRA (3008) Appeal No. 96-2, were sent to the following persons in the manner indicated:

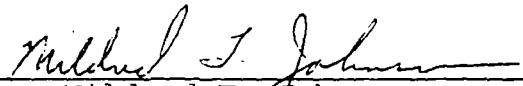
Certified Mail:

Warren D. Krebs, Esq.  
Owen, Shoup, Trolson & Kinzie  
3680 Bank One Tower  
111 Monument Circle  
Indianapolis, IN 46204-5136

Gary Development Company  
ATTN: Larry Hagen, Jr.  
P.O. Box 6056  
Gary, IN 46406

First-Class Mail:

Marc Radell, Esq.  
Office of Regional Counsel  
U.S. EPA, Region V  
77 W. Jackson Boulevard  
Chicago, IL 60604

  
Mildred T. Johnson  
Secretary

Dated: SEP 18 1996

---